Supreme Court, U.S.
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08-620 AUG 8 - 2008
No: OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

GRIMALDO DE OLIVEIRA, *et al*
Petitioner,

vs.

MICHAEL MUKASEY, Attorney General,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For the First Circuit

PETITION FOR WRIT OF CERTIORARI

Grimaldo de Oliveira, *pro se*
5702 Paleo Pines Cir
Fort Pierce, FL 34951

I

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I- Does an alien n alien (legally or illegally in the United States) have a constitutional right to petition the Federal grand jury to review a denial decision rendered by the first circuit in direct conflict with the decisions of other circuits where the administrative record establishes compliance sufficiently to reopen an *"in absentia"* decision?

II- Does an alien (legally or illegally in the United States) have the statutory right to petition the Federal grand jury to review a denial decision rendered by the first circuit in direct conflict with the decisions of other circuits where the administrative record establishes compliance sufficiently to reopen an *"in absentia"* decision?

III- The Question presented is whether the BIA failed to recognize petitioner's evidence of due diligence in the proceedings and that denial of motion to reopen was in violation of petitioner's due process right and that statute of limitations should have been tolled?

IV- The question presented is whether a denial decision to reopen an *"in absentia"* decision is rendered solely based in conservatism rather than in fairness to the petitioner in direct conflict with other decisions of other circuits, that may constitute a violation of petitioner's due process in immigration proceedings?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure Statement under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Grimaldo de Oliveira, *pro se,* respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the First Circuit . See Appendix A and B.

The Opinion of the BIA denying respondent's Appeal and Motion to Reopen and to Reconsider. See Appendix C and D.

The Decision of the Immigration Judge, denying petitioner's motion to reopen. See Appendix E

JURISDICTION

The Judgment of the court of Appeals was entered on January 15, 2008. A petition for rehearing was denied on May 13, 2008. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254 (1).*

CONSTITUTIONAL PROVISION INVOLVED

The Supreme Court has recently affirmed that "due pro cess applies to all persons within the United States, including Aliens, whether their presence here is lawful, unlawful, temporary or permanent." *Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct 2491, 150 L.Ed 653 (2001).*

Individuals in deportation proceedings are entitled to present personal testimony in their behalf. *C.F.R. § 240.10 (a) (4) (1999).* When these protections are denied, and such denial results in prejudice, the constitutional guarantee of due process has been denied. *U.S.v. Loasinga, 104 F.3d 484(1st Cir 1997). Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000).*

STATEMENT

Petitioner's due process of law was initially violated when the IJ, with a blind eye to the evidence, capriciously and substantially minimizing respondent's exceptional efforts to reopen immigration proceedings, denied motion to reopen as it was the only means to present evidence of exceptional circumstances that prevented him from appearing for scheduled hearing. The respondent was a victim of former attorney David Harsch's gross negligence who failed to communicate with his client, as he was the retained attorney of record to adequately inform the U.S. Immigration Court his change of address and failed to inform the respondent his motion to change venue was denied and that his case was decided in absentia. The respondent, preoccupied with the delay and lack of court's notice, sought the services of the law offices of Tony Mizelly , who after informing the respondent of this "*in absentia*" decision, offered to take the case and provide the IJ that exceptional circumstances prevented th[illegible]espondent to appear for scheduled hearing. Again, the r[illegible]ndent, who relied on his attorney to protect his interests [illegible]ed the respondent believe his case was being properly ha[illegible] and failed to communicate with the Immigration judg[illegible]d instead, took two years to inform the respondent he was unable to continue with his case and provided the respondent copies of his file through the Freedom of Information Act (FOIA) to justify his high retaining fees. Upon this information, the respondent acting *pro se,* filed a motion to reopen with the Immigration Judge and offered plausible explanation for failing to appear at scheduled hearing. The IJ, substantially minimizing respondent's efforts to have case reopened, denied his motion to reopen alleging lack of due diligence despite respondent's evidence of ineffective assistance of counsel (s). The respondent timely appealed to the BIA.On Sept. 19, 2006 the BIA dismissed respondent's appeal alleging that the IC provided notices of the hearing date, as it was provided at a December 7, 2000, master calendar hearing.

The BIA agreed with the IJ who agreed with the USCIS' attorneys, stating that respondent failed to comply with the *Lozada* requirements, where the evidence in the record was sufficiently enough to show evidence of ineffective assistance of counsel, where the respondent presented evidence of former counsel David Harsch's complaints filed by third partieswith the Massachusetts Board of Oversees for ineffective assistance of counsel. On March 13, 2007, again, the BIA, despite evidence of exceptional circumstances and ineffective assistance of counsel that prevented the alien to appear for a master hearing, stated that motion to reopen with the IJ was out of time and that respondents have failed to point out any error of fact or law made in BIA's decision of Sept. 19, 2006 dismissed motion for reconsideration. An Appeal to the U.S. Court of Appeals for the First Circuit was denied on January 13, 2008 which affirmed the BIA's decision stating that the BIA did not abuse its discretion in denying motion for reconsideration. A timely petition for re-hearing was denied with the same allegations refusing to accept the respondent's extraordinanary efforts to reopen a case which was caused by the neglect of former counsel (David Harsch) where evidence of prior neglect was introduced to the BIA and to the U.S. Court of Appeals.

Because the Petitioner sincerely believes he was a victim of gross neglect and ineffective assistance of counsel, is petitioning for a writ of certiorari as it is his constitutional right.

REASONS FOR GRANTING THE PETITION

In *Juliette Kaweesa v. Alberto Gonzalez, Attorney General, No. 04-2548*, on Petition for Review of an order of the Board of Immigration Appeals (BIA) dated June 9,

2006, U.S. Court of Appeals for the First Circuit reversed and remanded the matter above decided *"in absentia"* for reopening where the alien demonstrated that exceptional circumstances prevented her from appearing for scheduled hearing due to misrepresentation of counsel. The same situation applies to petitioner where two counsels, retained to protect the interests of petitioner, failed to adequately represent him in this "in absentia" decision., The petitioner, has demonstrated exceptional circumstances upon the filing of a motion to reopen because he did not receive proper notice of hearing after a motion for change of venue was filed *INA § 240(b)(5)(C) (ii),* due to former counsel's ineffectiveness to protect his interests. The Second, Ninth and Tenth Circuits have held that the filing deadlines are Subject to equitable tolling. *Compare Matter of A-A-,22 I&N Dec.140. 144 (BIA) 1998); Matter of Lei, 22 I&N Dec. 113, 116 (BIA 1998), with Riley v. INS. 310 F.3d 1253,1258 (10th Cir. 2002); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1225 (9th Cir. 2002); Iavorski v. INS, 232 F.3d 124, 130 (2d Cir. 2000); Varela v. INS, 204 f.3d 1237, 1240 (9th Cir.2000); Lopez v. INS 184 F.3d 1097, 1100 n.3 (9th Cir. 1999).* This means that the respondent may be able to file a motion to reopen after 180 days, particularly in situations where he/ she did not know about the *in absentia* order because prior counsel was ineffective. Equitable tolling of the deadlines is generally available only where the person exercised due diligence in pursuing his or her immigration case. *Scorteanu v. INS,339 F.3d 407, 413-14 (6th Cir. 2003; Jobe v. INS,238 F.3d 96, 101 (1st Cir. 2001); Iavorski v. INS, 232 F.3d at 134 (2d Cir. 2000).*

The term "exceptional circumstances" was added to the Act by the Immigration Act of 1990 (effective June 13, 1992). The respondent provided detailed and plausible explanation

for failing to appear; provided adequate information and documentation in support of motions and appeals; The respondent exerted any possible way to provide an explanation for such failure to appear. The respondent never assumed his motion to change venue would be granted. However, trusted former counsel to adequately inform him of denial so he could appear at scheduled hearing. The decision of the Court of Appeals in this case is in conflict with other Circuits that have considered these issues. This Court's intervention is therefore necessary to insure uniformity in the application of the law. The alien diligently sought reopening of this matter as soon as he learned his case was decided "*in absentia*." The statute and regulations allow the Attorney General to reopen proceedings for continuation of asylum claim and /or seek available relief as it maybe available for the petitioner's children who were approved by the CIS for legalization of status but unfortunately, after case approved it was reopened and it is currently pending for new consideration. (please see MSC-0807114761 and EAC-0601952644)

CONCLUSION

For the reasons above shown, Petitioner, *et al,* urges that the statute of limitation to file a motion to reopen or to reconsider be tolled because the record itself reflects evidence of due diligence and that its denial is a violation of his constitutional due process in immigration proceedings. Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

COPY

Grimaldo de Oliveira, Petitioner, *pro se*
5702 Paleo Pines Cir
Fort Pierce, FL 34951

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1505

Grimaldo de Oliveira, petitioner

v.

Michael Mukasey, Attorney General, respondent

January 15, 2008

Before Boundin, Chief Judge,
Torruella and Lynch, Circuit Judges.

JUDGMENT

After carefully considering the briefs and record on appeal, we affirm the judgment below. The sole issue properly before us is whether the Board abused its discretion in denying the motion to reconsider. See *Ven v. Aschroft, 386 F.3d 357-360 (1st Cir. 2004).* Since the petitioner identified no error of fact or law in the board's earlier decision, the board did not abuse its discretion in denying the motion. *Zhang v. INS, 348 F.3d 289 (1st Cir. 2003).*

APPENDIX B

UNITED STATS COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1505

Grimaldo de Oliveira. Petitioner

v.

Michael Mukasey, Attorney General, Respondent

May 13, 2008

Before Boudin, Chief Judge,
Torruella and Lynch, circuit Judges.

ORDER

We Deny the motion for rehearing. The appellant raises no potentially meritorious issues that we have not previously considered.

APPENDIX C

U.S. Department of Justice- Decision of the BIA, Falls Church, VA 22042.

File: A78 575 127-Boston Date: Mar 13, 2007

In Re: Grimaldo de Oliveira,
Marlucy Janes Rodrigues Alves
Priscilla Isabel Rodrigues de Oliveira
Lisa Marie Rodrigues de Oliveira

In Removal Proceedings

Motion

On Behalf of the Respondents: pro se

PER CURIAM: The respondents move the Board pursuant to 8 CFR § 1003,2 to reconsider our decision dated September 19, 2006. On that date, we dismissed an appeal from an immigration judge's denial of the respondent's January 20, 2006, motion to reopen, in which the lead respondent argued that his failure to appear for his June 2001 hearing (resulting in an in absentia order of removal) should be excused due to ineffective assistance of counsel. The respondents argue that there was an error of law made in our decision in that we failed to vacate the immigration judge's decision pursuant to Matter of M-P-20 I&N Dec. 786 (BIA 1994). A motion to reconsider must state the reasons for reconsideration , be supported by pertinent case precedent and be predicated on legal or factual defect in the most recent decision. See 8 CFR § 3.2(b)(1); Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). In our prior order, we cited Matter of M-P-, supra, and found that the respondents were not prejudiced by the immigration judge's brief decision

denying the motion to reopen because the underlying rationale was clear-*i.e.*, the immigration judge stated that he was denying the motion for the reasons stated in the opposition filed by the Department of Homeland Security ("the DHS," formerly the Immigration and Naturalization Service).The reasons included (1) the fact the motion to reopen was filed years past the 180-day time limit for such motions, (2) that the lead respondent was present in court and received actual notice of the missed June 2001 hearing date, and (3) that the respondents failed to comply-and to date still have not complied -with the requirements of Matter of Lozada, 19 I&N Dec. 637(BIA 1988) for making a claim of ineffective assistance of counsel . The respondents do not address any of these substantives bases for the denial of his motion, nor do they dispute that they had notice of the reasons for the denial of the motion. Rather, they simply state their disagreement with those reasons. Thus, the respondents have failed to point out any error of fact or law made in our September 19, 2006 decision. Accordingly, the motion is denied.

/a/ Illegible
FOR THE BOARD

motion to reopen, and the immigration judge in his September 20, 2005, decision stated that he agreed with the DHS.

The Immigration Judge therefore properly found that the respondents had been provided notice of the hearing date, as it was provided at a December 7, 2000, master calendar hearing. Under such circumstances, an order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(5), may be rescinded only upon a motion to reopen, filed within 180 days, which demonstrates that the alien failed to appear because of exceptional circumstances. Section 240 (b)(5)(C) (i) of the Act; Matter of Guzman, 22 I&N Dec. 722 (BIA 1999).

The motion to reopen was filed years late . The respondents claimed that they received ineffective assistance of counsel, but failed to comply with the requirements of Matter of Assaad, 23 I&N Dec. 553 (BIA 2003) and Matter of Lozada, 19 I&N Dec. 637 (BIA 1988) for making such a claim. See Lawrence v. Gonzales, 446 F.3d 221, 226 (1st Cir.2006) (noting that procedure set forth in these cases are "required" for making a claim of ineffective assistance of counsel before the Board).

ORDER: The appeal is dismissed.

Illegible

FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia, 22041

Files: A78 575 127- Boston
A78 575 128
A78 575 129
A78 575 130

Date: Sept 19 2006

In Re: GRIMALDO DE OLIVEIRA
MARLUCY JANES RODRIGUES ALVES
PRISCILLA I. RODRIGUES DE OLIVEIRA
LISA MARIE RODRIGUES DE OLIVEIRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF THE RESPONDENTS: pro se

In a September 20, 2005, decision, an Immigration Judge Denied the respondent's motion to reopen removal proceedings. The respondents appeal that decision. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the respondent's appeal. The appeal will be dismissed.

An immigration judge ordered the respondents removed *in absentia* after they failed to appear for a June 20, 2001, Immigration court hearing. On July 29, 2005, the respondents filed a motion to reopen proceedings. The DHS opposed the

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

DEOLIVEIRA, GRIMALDO
5702 PALEO PINES CIRCLE DATE: Nov.7.2005
FORT PIERCE FL 34951

IN THE MATTER OF
DEOLIVEIRA, GRIMALDO FILE 78 575 127,128,129 & 130

ORAL DECISION OF THE IMMIGRATION JUDGE
(HAND WRITTEN DECISION)

9/20/2005

Motion to Reopen is denied for the reason stated in DHS objection to (illegible) . Signed: illegible.

APPENDIX F

CERTIFICATE PAGE

I, Grimaldo de Oliveira, hereby certify that the attached proceeding in the matter of :

GRIMALDO DE OLIVEIRA
A 78-575-127, 128, 129, & 130

Boston, Massachusetts

Was held as herein appears, and that his is the original transcripts thereof for the file of the Executive Office for Immigration Review.

/s/ Grimaldo de Oliveira
5702 Paleo Pines Circ
Ft. Pierce, FL 34951